

Implementation of Court-Annexed Environmental Mediation: The District of Oregon Pilot Project

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To draw out the threads of the wide-ranging influence of the Pound conference and the work of Professor Frank Sander, I will begin with a personal reflection.

I first heard about mediation during my second year in law school when I took a course with the Honorable Dorothy Wright Nelson, a judge on the United States Court of Appeals for the Ninth Circuit. Fresh out of law school in the 1950s, Judge Nelson had worked with Dean Pound on issues affecting the justice system and later wrote a casebook for West Publishing Company on Judicial Administration and ADR.¹ In her book and her course she prominently profiled the work of Professor Sander, whose notion of a multi-door courthouse set the stage for much of the ADR work done in court systems in the 1980s. He has also inspired scholars, judges, and court administrative officers to make his vision of a multifaceted dispute resolution center with vibrant options for conflict resolution a reality.²

Judge Nelson, drawing on the work of Professor Sander, has been a strong force for promoting ADR in state and federal court systems nationwide. As one of the early female law deans who was active in ADR, Nelson led the American Judicature Society and other court-related organizations. She taught ADR for several decades and worked with judges in Los Angeles County, one of the largest court systems in the world. Her students have become judges, led judicial systems, and chaired the American Judicature Society. Like Professor Sander's students, many have become ADR practitioners, teachers, and scholars.

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¹ See generally Lisa A. Kloppenberg, *A Mentor of Her Own*, 33 U. TOL. L. REV. 99 (2001).

² See Frank E.A. Sander, *Varieties of Dispute Processing*, Address Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), in 70 F.R.D. 111, 133-34 (1976).

Judge Nelson has now been active in the Ninth Circuit for over twenty years and her convictions about the possibilities of ADR have thrived within that institutional structure. The court employs more than half a dozen full-time mediators and Nelson chairs the court's committee on ADR which is responsible for overseeing the implementation of the ADR Act of 1998³ in federal courts throughout the Western United States. She has also founded the Western Justice Center Foundation—a nonprofit organization dedicated to promoting ADR. Professor Sander serves as the Senior Program Consultant and has provided invaluable assistance in establishing ADR programs.

Both Dorothy Nelson and Frank Sander built bridges between the legal academy and the courts. Theory and practice informed their work and enriched courts and our thinking about the appropriate roles judges and other court personnel can play in conflict resolution. I was so intrigued by the challenge proposed by Dean Pound, the work of Professor Sander, and the leadership of Judge Nelson, that I have devoted a substantial amount of my time to ADR as a mediator, teacher, and scholar. I founded the Appropriate Dispute Resolution program at the University of Oregon and was hired as Dean of the University of Dayton School of Law in large part because of my interest in promoting ADR within legal education. At the University of Dayton School of Law, we strive to educate service-oriented lawyers concerned with both private and public good who will be ethical counselors to their clients. Teaching them about ADR is an integral part of such training.

I hope these personal reflections provide a small glimpse of some practical examples of how Professor Sander has made a difference in both legal education and the judiciary. The remainder of this Article reviews a specific, court-annexed pilot program project within the Ninth Circuit designed to promote the use of mediation to resolve selected environmental cases in the federal trial courts in Oregon. This report surveys some important factors to consider in environmental conflict resolution, discusses the goals and parameters of the Oregon pilot, and considers some tentative lessons to be drawn. This conference concerns the many ways in which mediation has impacted the nation's justice systems. As noted in the introduction to this Symposium, mediation "has enjoyed both popular success and stinging rebuke. Some commentators view its use as essential for ensuring citizen confidence in our judicial system, while others warn that its presence undermines citizen access to public courts and the rule of law."⁴ These tensions are played out beautifully in public policy disputes that often

³ Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–658 (2001).

⁴ Brochure of the Ohio State Journal on Dispute Resolution, *The Impact of Mediation: 25 Years After the Pound Conference* (Nov. 8, 2001) (on file with the Ohio State Journal on Dispute Resolution).

COURT-ANNEXED ENVIRONMENTAL MEDIATION

involve numerous parties, issues of pressing public concern, and complex questions of resource allocation for present parties and those with future interests. The Oregon environmental mediation pilot can help us explore the appropriate ADR work of courts in such circumstances, but it is just one narrow, limited example. It is worth posing a few overarching questions applicable to all justice systems as we envision and implement a multifaceted approach to dispute resolution.

1. What must mediation look like to be acceptable to courts? In other words, what kind of constraints are contained in the options we have fashioned within courts, even within the multi-door court systems of the last twenty-five years?

2. Is it appropriate for courts to encourage public policy mediation, a growing area for mediation practice and theory? In other words, should we add another door to the current configuration offered by most courts with ADR programs or is public policy mediation best handled outside of the courts?

3. Finally, what are some of the most effective strategies or tools that can be employed by judges and mediators in resolving environmental public policy disputes? The Oregon pilot offers a structure, including research questionnaires, that can be used by others thinking about establishing court or agency public policy mediation programs.

I. ENVIRONMENTAL CONFLICT RESOLUTION AND OREGON FEDERAL FILINGS

The pilot involved cases filed in the Oregon federal trial court, not conflicts at a pre-litigation stage or in an agency setting. Dr. Peter Adler's study of the prospective use of ADR for environmental cases contains relevant findings for trial courts in the Ninth Circuit.⁵ Discussions with judges, other court employees, and mediators familiar with prior cases in the Oregon federal court confirmed the presence of many similar factors in Oregon environmental cases.

Environmental cases comprise only about two percent of the civil docket in Oregon. From 1990–2000, between twenty-three and thirty-five environmental lawsuits were filed annually. These cases involved claims regarding water use, fishing rights, endangered species, Native American sacred remains, water and land pollution, hazardous waste cleanup, impacts of proposed development, timber theft, and timber sales. The handful of

⁵ See generally Memorandum from Peter S. Adler, 1999 WJCF Senior Fellow & USIECR Advisor, to Mr. William Drake, Executive Director Western Justice Center Foundation, & Dr. Kirk Emerson, Director U.S. Institute for Environmental Conflict Resolution (Oct. 6, 1999) (on file with author).

cases that proceeded to mediation through this pilot primarily centered on water and ground pollution, with federal agencies involved.

Although few in number, the cases are important in several respects. Few proceed to trial, but motion activity is significant. Judges, law clerks, and administrators report that the cases are time-intensive for them.⁶ Some are resource-intensive for the court because they involve complex legal and factual issues. Many are paper intensive (one judge referred to "endless paper piles"), and some involve multiple appeals. Because some environmental cases are resolved by consent decrees, they linger on the docket and can entail more of a managerial, long-term role for the court. They often "return" to judges more than other civil cases due to the need for monitoring compliance and the potential for changed circumstances. Nevertheless, some judges enjoy these challenging, complex, and fascinating cases.

In the litigation process, environmental cases are resource-intensive and slow moving in part because they tend to involve scientific uncertainties.⁷ Parties sometimes spend significant amounts for data not used. Some cases require expertise on economic and sociological issues. Judges cited the presence of scientific experts with adamant viewpoints, which tend to harden adversarial positions, as it is difficult to find credible, neutral scientists.⁸ Some Oregon judges believe that the focus on "dueling experts" is a barrier to greater party involvement and exploration of the party's broader interests. One noted it is difficult for clients to let lawyers "take off advocacy hats and put on reconciliation hats" in this context.

Additionally, environmental cases often present difficult questions of public interest.⁹ Some are politically charged with strong emotions and opposing views on significant legal and factual questions. People or entities that are not parties to the lawsuit can have a significant interest in the conflict

⁶ Interviews by Lisa A. Kloppenberg and Elaine Hallmark with judges, magistrate judges, law clerks, and court administrators from the United States District Court for the District of Oregon (May 27, 2000; June 6, 2000; Feb. 15, 2001).

⁷ See PETER S. ADLER, RESOLVE, INC. et. al., MANAGING SCIENTIFIC & TECHNICAL INFORMATION IN ENVIRONMENTAL CASES: PRINCIPLES AND PRACTICES FOR MEDIATORS AND FACILITATORS 6, available at http://www.ecr.gov/pdf/ecr_papers_2.pdf (last visited Apr. 1, 2002).

⁸ See *supra* note 6.

⁹ For more information on the difficult challenges presented by environmental conflicts and the promise of mediation in this context, see generally ADLER, *supra* note 7, at 5-9; GAIL BINGHAM, RESOLVING ENVIRONMENTAL DISPUTES: A DECADE OF EXPERIENCE 77-83 (1986); AMY J. DOUGLAS, THE POLITICS OF ENVIRONMENTAL MEDIATION 2-3 (1987); Charlene Stukenborg, *The Proper Role of Alternative Dispute Resolution (ADR) in Environmental Conflicts*, 19 U. DAYTON L. REV. 1305, 1333-39 (1994); Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 8-13 (1981).

or present barriers to implementing solutions.¹⁰ Some are high stakes cases in terms of precedent, media attention, and public significance. A wide variety of interests participate including the following: Tribes, federal entities, States, local political subdivisions, public interest groups, private entities, industry, commercial, and sports fishing interests. The “big picture problems” in some of these disputes—involving long-term, multiple interests—require durable solutions, not just swift disposition.

Environmental cases are frequently resolved on procedural issues or narrow grounds so that courts do not reach the merits of underlying scientific or legal claims. Federal court review of federal agency action, for instance, is limited. Parties sometimes request narrow legal relief, which will not address the root problem or prevent future rounds of conflict among the parties. Sometimes conflicts among federal entities dominate environmental lawsuits. Rather than revolving around retrospective harms (*e.g.*, an appropriate amount of damages), these cases often center on future problem solving. It is challenging for courts to structure remedies, which can account for future environmental and financial uncertainties (*e.g.*, changing habitat, water levels, species levels, political settings). Moreover, court solutions are not always sufficiently flexible.¹¹ Judges spoke of cases that need a balancing of interests (*e.g.*, water flow levels) versus others that “cried out for legal resolution.”

The U.S. attorney in Oregon noted that the office’s efforts in using ADR had been quite successful in all areas *except* in environmental cases. It was much more difficult to get those cases to use mediation. The office expressed interest in understanding and changing this phenomenon and worked with sponsors as the pilot proceeded.

Thus, while the sponsors realized the myriad of challenges presented when courts encourage environmental mediation, they believed the potential gains made the effort worthwhile. A mediated agreement, in contrast with adjudication, could expand the parties’ ability to bring important underlying issues to the table, to include necessary non-parties, and to provide more flexible and durable solutions, preventing some future conflicts among the parties and others.

¹⁰ Jennifer Gerarda Brown, *Ethics in Environmental ADR: An Overview of Issues and Some Overarching Questions*, 34 VAL. U. L. REV. 403, 406 (2000) (addressing the ethical obligations that may fall upon those who participate in environmental ADR).

¹¹ See *supra* note 6.

II. THE GOALS AND PARAMETERS OF THE OREGON MEDIATION PILOT PROJECT¹²

In 1998, Congress and the President enacted the Alternative Dispute Resolution Act requiring federal trial courts to promote the use of ADR by implementing an ADR program.¹³ Under the Act, districts must evaluate existing ADR programs, and each district must designate a judicial officer or court employee to handle certain ADR-related functions.¹⁴ As part of implementing this mandate, Judge Proctor Hug, Jr., then Chief Judge of the Ninth Circuit, and Judge Dorothy Wright Nelson, chair of Ninth Circuit ADR Committee, expressed critical support for this pilot and similar projects throughout the Ninth Circuit.

The sponsors of the pilot included the following: the U.S. District Court for the District of Oregon, the U.S. Institute for Environmental Conflict Resolution (USIECR), the Western Justice Center Foundation (WJCF), and the ADR Program of the University of Oregon School of Law. Oregon was the first district to initiate an environmental mediation pilot in large part because of the interest of the District's Chief Judge, Michael Hogan, and other Oregon judges in promoting ADR. Other sponsors helped keep the potential pilot on the judges' agenda. Resources devoted by sponsors, particularly USIECR's funding of a part-time Project Coordinator position, were also critical to get the pilot underway.

This voluntary environmental mediation pilot is designated "court-annexed" because the court is giving access to cases (either through the docket or by judicial referral), it is supportive of a neutral Project Coordinator responsible for contacting parties in environmental cases to see if they will consider mediation, and because its aim is to learn how the court can best work to support the use of voluntary external mediation.

A. Goals for the Pilot Project

First, the sponsors developed and agreed upon multiple goals for the Oregon pilot and case criteria, including the objective to mediate five to ten environmental litigation cases.¹⁵ The mediators might reduce the number of contested technical and scientific facts, help streamline or resolve legal issues, and create opportunities for integrative and mutual gains negotiations.

¹² This Section comes from the personal knowledge and involvement by Dean Kloppenberg with the project.

¹³ Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–658 (2001).

¹⁴ 28 U.S.C. § 651(d).

¹⁵ See *infra* p. 587 app. A.

The pilot would utilize highly experienced and well-assigned mediators. The sponsors wanted to discover better ways to match the skills and experience of prospective mediators with the needs of litigants and lawyers, as well as to facilitate connections between the court and potential mediators. The sponsors also sought to help develop capacity locally in environmental mediation. Mediation might expedite cases by saving time and money for the court and the parties by increasing the pace of issue resolution and beating the average time to disposition for environmental cases. Mediation also might provide a fair and satisfying dispute resolution process by improving the quality of communication and information exchange and reducing the emotional friction involved in these cases. The sponsors hoped mediation would produce more stable, enduring, and implementable outcomes, thereby reducing the chance for issues to return to litigation and improving the relationships between parties who would need to work together in the future. Finally, the sponsors agreed that the law school would evaluate the outcomes of the pilot project and publish the results. This could lead to a compendium of settlement tips, tools, and techniques for those involved in environmental litigation and encourage the further use of environmental mediation in the District of Oregon with potential applications for other courts.

Notably, the basic aims of decreasing costs and resolution time for the parties and court were balanced with potentially opposing goals, such as creating stronger, more durable outcomes (which could broaden the issues on the table), bringing better scientific and technical information to solutions (which could require significant expenditures), and fostering stronger working relationships that allow for better post-litigation implementation and compliance as well as collaboration in future conflicts (which could involve more extensive mediation, increasing time and cost). An important assumption of many parties involved—from sponsors to individual judges to members of the mediator panel—was that ADR is not a panacea. It is not a complete replacement for existing court processes and cannot completely address the competing health and resource problems involved in environmental disputes.

B. Case Selection Criteria

The sponsors agreed that the environmental cases selected for mediation would involve natural resources, pollution and toxics, or public land.¹⁶ The pilot sought cases with parties in continuing relationships and in which the parties have some overlapping interests and a possibility for mutual gain. Over time, the USIECR emphasized the goal of selecting cases with

¹⁶ See *infra* p. 588 app. B.

possibilities for integrative gains rather than pure cost allocation problems. In part because the District of Oregon already has experienced adjudicators and settlement judges available at no additional cost to litigants, the pilot's focus was on issues that are not easily resolved by a judicial decision or by a traditional evaluative settlement conference. Thus, the pilot did not encompass cases that would not require the establishment of a new legal precedent for resolution. Due to USIECR involvement, cases had to involve a federal agency, a federal statute, rule, or policy dealing with the environment. Cases with scientific and technical complexity were preferred.

The consent of the parties and the court to mediate a particular case was an important criterion. Parties were required to be willing to mediate in good faith and bring the right people to the table. Parties had to pay the mediation fees. All mediators involved in the pilot agreed to reduce fees if necessary to get cases into mediation. Parties entering mediation had to agree to cooperate with the evaluation of the pilot. Sponsors designed a sample mediation agreement containing these criteria.¹⁷ Thus, the voluntary nature of participation in the project was one of its critical features.

Unless otherwise agreed by the parties and the court, no substantive communications or reports could be made from a mediator to a trial judge about a particular mediation. Mediators could coordinate their efforts with a settlement judge assigned to a case, unless the parties precluded such communication. The parties, attorneys, and mediators agreed to participate in a program evaluation.

III. OPERATIONS DURING THE INITIAL PHASE OF PILOT¹⁸

Significant time and resources were devoted to building relationships between the sponsors and Oregon judges during the initial phase of the pilot. A series of meetings were convened to design the pilot and approval was sought from the Ninth Circuit and the Oregon District Court. The pilot commenced in January 2000. Sponsors anticipated that it would continue for eighteen months or until five to ten mediations were complete.

A. *Role of the Project Coordinator*

With support of the Oregon court, USIECR designated and funded a local Project Coordinator, Elaine Hallmark, to get the project going. As a lawyer and experienced environmental mediator, she served as a bridge

¹⁷ See *infra* pp. 589-94 app. C.

¹⁸ This Section comes from the personal knowledge and involvement by Dean Kloppenberg with the project.

COURT-ANNEXED ENVIRONMENTAL MEDIATION

between the court, parties and counsel, and potential mediators. She helped build and maintain support for the program, reported regularly on her activities and progress to the sponsors, and talked with numerous parties in cases. Her duties included the following:

1. Fostering the relationship and continuing the communications among the project sponsors, particularly the USIECR, the judges, and the University of Oregon. This included developing or refining the protocols for various aspects of the project such as the case selection criteria and the development and administration of the panel of mediators.

2. Establishing, orienting, and communicating with a panel of experienced environmental mediators. This included coordinating an orientation and advanced environmental mediation workshop for them.

3. Finding appropriate environmental cases, developing voluntary commitments from the parties in litigation to participate in mediation, paying for the mediators, and participating in the evaluation process for the pilot project.

In all cases, Ms. Hallmark explained the pilot project and informed parties about the range of approaches to environmental mediation. In some instances she negotiated pre-mediation agreements on the substance of the dispute and fee sharing agreements among the parties. In some cases she helped “keep a conversation going” about expeditious and early resolution, which may have spurred some attorneys and litigants to undertake earlier or more serious settlement negotiations on their own.

The Project Coordinator, due to earlier commitments and other start-up activities required, was unable to begin assessing cases before April 2000. By early 2001, Ms. Hallmark had spent more than 350 hours on the pilot and by the time her activities concluded in September 2001, she had devoted 535 hours to the pilot.

B. Developing Information on the Environmental Docket

It was fairly difficult to get data on the court’s environmental docket. The court has not kept detailed records on types of dispositions in environmental cases, time to disposition, ADR efforts, or other data. More specifics on how such cases are processed would be extremely useful. The clerk’s office reported that between 1990 through June of 2000, between twenty-three and thirty-five environmental (category “893”) cases were filed per year. For 1998, twenty-seven of thirty-four cases were closed by June 2000. Of those twenty-seven, eleven settled, sixteen were disposed of by motion and none had gone to trial yet. For 1999, eighteen of the twenty-eight files were closed by June 2000. Four of those settled, nine were disposed of by motion, four in another fashion, and none had gone to trial yet. It is

unclear what role lawyers for the parties, assigned judges, settlement judges, or external conflict resolution experts played in the settlements.

At the time of this pilot, little was recorded about time spent in judicial settlement conferences or results achieved. Whenever the Oregon judges had a case that they believed could benefit from judicial settlement efforts, they usually sent notice to their colleagues who would volunteer for the duty.

C. Judicial Attitudes Toward ADR and External Mediation in Environmental Cases

At the outset of the pilot, sponsors encountered mixed views among Oregon federal judges about the appropriateness of ADR for environmental cases and the need for encouraging external mediation.¹⁹ Some judges in the District of Oregon, including the chief judge, believe that environmental cases are well suited to ADR because of the number of parties, the complexity of the disputes, and for other reasons canvassed above. Other judges expressed concern that the cases involve legal issues or matters of public concern and should not be routed to non-judicial ADR settings. A few were concerned about the cost of external mediation. Based on prior experience, a few judges expressed concern about the quality of external mediation and the court's obligation to ensure a high quality experience when engaging in court referral of cases.

Some judges also had ideas, based on their experience with environmental disputes, about the types of cases appropriate for ADR versus adjudication. For example, some judges suggested that some Endangered Species Act (ESA) cases are clearly appropriate for adjudication because they need a legal ruling on the listing or failure to list a species. Other factors mentioned by judges as making cases inappropriate for mediation included high precedential value and reasons to wait for agency action like an ESA listing determination. A party involved in numerous ESA cases, however, opined that while some judges think ESA cases only involve legal questions, some ESA cases may be amenable to settlement because of constraints on agency resources in handling listing matters.

Each federal judicial district is unique. Oregon is a small court (with fewer than a dozen Article III and magistrate judges). The judges place a premium on not having a long backlog, and some aggressively promote settlement efforts. Some of the Article III and magistrate judges are experienced settlement judges, enjoy this work, and think more judges should be doing it. Thus, some judges did not see a strong need for developing external ADR options. Some were concerned about additional

¹⁹ See *supra* note 6.

cost and delays for parties. Other judges expressed hopes that external mediators could offer more time and a "different persona" than could federal judges. For example, when judges engage in settlement conferences or encourage ongoing negotiations between parties in environmental cases, they find that multiple conferences and long-term negotiations are frequently needed. As one experienced settlement judge noted, while "most settlement conferences in civil cases take a day or part of a day, environmental cases take conference after conference." Most judges were not familiar with many environmental conflict resolution practitioners, despite the strong cadre of experienced environmental mediators in Oregon and did not regularly refer such cases to external mediators. The judges were most familiar with mediators traditionally connected to courts in civil cases (*e.g.*, a former U.S. attorney, retired judges, and well-known litigators). The pilot has served at least to inform judges about a broader pool of experienced environmental mediators in Oregon.

In addition to judicial attitudes, the perceptions of parties and attorneys about their options within a court influence decisions about conflict resolution options.²⁰ The Oregon judges often have a track record well known to parties in environmental cases. Some public interest organizations are concerned about being forced into settlement generally or into settlement discussions with a limited set of issues on the table or discussions that delay their opportunity for a ruling. Repeat players' skepticism of some judges or their past experience with judicial settlement efforts may make them less disposed to resolve cases early through use of external mediators rather than await a judicial ruling, appeal to the Ninth Circuit, or settle on their own.

The judges had different views on the appropriate timing for ADR.²¹ Some viewed an early referral to mediation or settlement conference in most environmental cases as worthwhile while others expressed reservations about choosing the right timing for ADR in each case. They differed on whether a consistent court ADR process should be used or whether case-by-case flexibility should be retained. One noted that a host of factors must be examined and experienced judges are skilled at conducting such assessments. For example, judges often take into account critical items such as when serious exploration of settlement is probable given an attorney's interest in generating sufficient fees. One attorney told the Project Coordinator that repeated reminders about mediation could be useful if a lawyer or party is awaiting the next stage of litigation or another event. In one potential pilot case, the parties chose to await a summary judgment ruling, knowing that

²⁰ This Section comes from general sentiments gained by Dean Kloppenberg from working with environmental lawyers in Oregon.

²¹ See *supra* note 6.

ruling would not offer complete victory to either side. They felt they could better assess the potential for mediation once they knew the ruling.

One judge expressed concern that referrals to external mediators might lead to delay if judges put cases on hold during an unproductive or stalled mediation process and suggested a reporting requirement. Sponsors devised a proposed order that individual judges could use to provide mediators protections under the local rules and establish a mechanism for keeping a judge informed in general terms about the progress of the mediation.

The Oregon judges, like lawyers and mediators, also expressed divergent views on whether mediators with subject matter or other expertise should be sought or whether the primary value a mediator brings is process skills. In their own adjudicatory work, some judges think environmental expertise and technical backgrounds are helpful while others see more value in a generalist who can be educated by adversarial experts like lawyers and scientists or by credible neutrals. There is little familiarity with the roles that pre-mediation assessment, convening, and process design play in the likelihood of a successful mediation in environmental, natural resource, and public policy cases.²²

Little is known about the use of ADR in environmental cases filed in the Oregon federal trial court prior to the pilot. All information is anecdotal, drawn from interviews with the judges and without the perspective of the parties and lawyers involved. Judges have used settlement conferences to resolve some environmental cases. One federal and one state judge teamed up to resolve a dispute with complex scientific and technical issues arising out of a landslide by using neutral experts the parties agreed upon to assess remedial options. In a few cases involving water usage, judicial settlement conferences resulted in agreements, but the issues may return to the court if water shortages occur. One case selected binding arbitration but eventually settled as delay ensued and arbitration expenses escalated. Judges have referred a few cases to external mediation. Several judges have been innovative in using court-appointed scientific experts; for example, in an older case involving management of a fisheries resource, the parties agreed to fund and make available a respected scientist to educate the judge, but the expert was not available for adversarial discovery. The scientist was not employed as a special master to whom the adjudicator delegates work, but as an advisor.

²² See U.S. Institute for Environmental Conflict Resolution, What Is Environmental Conflict Resolution, Glossary of Terms, at http://www.ecr.gov/ecr_glossary.htm (last revised Jan. 24, 2000).

*D. Referrals*²³

The pilot sponsors initially assumed that most referrals would come from judges who had identified cases on their dockets that were “ripe” for mediation. The project was also open to cases being self-referred or identified in other ways. Cases would be referred to the Project Coordinator who would then gather information on the cases, contact the attorneys for all the parties and help them assess the potential for mediation, resolve any initial issues including fees, help them select a mediator, and get the agreement to mediate and confidentiality agreement in place.

Chief Judge Hogan requested from all the judges a list of cases to refer to the project resulting in a list of ten cases for initial referral. The Project Coordinator began to track down information from the dockets and the law clerks on those cases and obtain contact information for the parties. One of the cases was ready to go to mediation, but the parties subsequently chose to use a settlement judge. It was soon discovered that seventy percent of these initial cases were “distributive,” with cost allocation among private parties used primarily for cleanup. Almost all had settled or were near settlement by the time the Coordinator contacted the attorneys. Discussions with the sponsors clarified that the pilot project should not be heavily weighted with that kind of case, because those cases were settling on their own or with judicial settlement conferences. Thus, the Project Coordinator had to make other efforts to obtain referrals of the more complex environmental cases that were not immediately seen as being amenable to mediation.

The Project Coordinator and the evaluator held individual meetings with each of the judges to discuss the pilot, the potential of external mediation in environmental cases, and to seek further referrals. When an intern became available during the summer, she was able to secure the full docket list of open environmental cases and contact the judges or their law clerks in an attempt to learn the status of the cases and their potential for mediation. As the project became more widely known, some attorneys requested information, and some judges referred newly filed cases. In January 2001, the Project Coordinator increased her focus on identifying cases that had not been referred that involved the United States as a party. Consequently, she was able to get a list of cases being handled by the Justice Department in Washington, D.C., from the local assistant U.S. attorney, and she also identified cases directly from the latest docket list.

²³ This Section comes from the personal knowledge and involvement by Dean Kloppenberg with the project.

E. Pilot Resolution Data

As of August 15, 2001, the following summary statistics had been compiled:

Seventy-five cases were screened by the Project Coordinator during the pilot. This represented almost the entire docket of environmental cases in the District of Oregon. While the entire docket was reviewed, only those cases that appeared to have some potential for mediation were screened.

Of the seventy-five, twenty-one were referred directly by the judges (ten from the chief judge initially and eleven in interviews or direct calls); thirty-eight were identified by the Coordinator from the docket; six were requests from attorneys; and another ten were referred by the U.S. attorney who handles environmental cases in the District.

In thirteen cases, parties agreed to participate in mediation (including one case that was not filed). Seven of those cases were primarily distributive (*i.e.*, the key issues were distributing costs among parties). Six of the cases might be termed integrative because resolution of the issues was likely to require more joint problem-solving approaches.

F. Outcomes in Mediation

The seven distributive cases were primarily cleanup cases, involving allocation of costs or recovery of costs. For example, one case was an enforcement case involving the amount of a fine for violations of the Clean Air Act. One was a NEPA case involving a federal agency, and one was an enforcement case under the Clean Water Act involving a federal agency and a pro se party. Two of the seven distributive cases resolved in mediation (including the non-filed case). One case remained pending as of August 15, but there are indications that it will settle without an actual mediation session. Two returned to the litigation process after mediation (in one of these, parties had selected a settlement judge rather than an external mediator from the pilot project). One case went to mediation without success, then used litigation to resolve a major issue, then returned to mediation to structure an arbitration process to resolve the remaining issues. One case proceeded to a mediation session, using a legal expert as an advisor to the mediator, but then parties continued with further discovery. The Coordinator reports that the mediation may resume later.

The six integrative cases include a range of environmental issues: a NEPA/federal agency action; a Clean Water enforcement case; a timber sale; an Endangered Species Act case involving contested time for establishing critical habitat designations; and two agency permit/private party actions. Of these, three settled through mediation. In one case, parties withdrew from

mediation before even finalizing the choice of the mediator. The parties tried to negotiate on their own, but proceeded to trial. In one case, mediation was still pending as of August 15. One case did not settle in mediation. Although the substantive issues appeared to be resolved, a dispute over attorney fees remained. Some negotiations may have continued in that case, the Coordinator reported.

G. Other Dispositions

Of the seventy-five cases reviewed, twenty-three settled on their own without using mediation. One of these involved parties from an earlier mediation within the pilot, and they negotiated settlement using a similar approach. One case settled in mediation outside the pilot. Two cases settled using a settlement judge, and parties in one case were before a settlement judge as of August 15. In another case, a major convening/case assessment effort was being considered as of August 15.

Thirty-six cases continued in litigation. In two of these, parties tried to resolve issues using a settlement judge, but settlements were not achieved. One of the original referrals had not yet been filed as a case and may be developed into another pilot project after August 15, 2001. That process might include designing an ADR process for a large number of similar cleanup cases likely to be filed in the district in the future.

Another pilot may involve a collaborative approach to looking at the best use of resources for addressing the myriad filings of ESA petitions.

A settlement judge was working on several suits arising from drought and curtailment of irrigation issues. Depending on the outcome, a longer-range solution may be considered on a broader basis and with some ADR process assistance provided to the court.

Another potential special project being considered as a result of discussions connected to the pilot project involves problems related to multi-agency permitting. It may be possible to combine state and federal issues within a mediation on site-specific issues.

H. An Assessment Note

In one of the mediated cases within the pilot, the Project Coordinator engaged in significant preliminary work to assist parties with negotiations around entering into mediation. The parties eventually negotiated a pre-mediation agreement relating to substantive issues and agreed to modify an existing injunction. They then negotiated their fee and mediation agreements and ultimately did resolve the case through mediation. This suggests that in some environmental cases, the pre-mediation conflict assessment and

subsequent convening work is a necessary precursor to actually engaging in mediation. This pilot, however, was not designed to include this kind of conflict assessment for every case. If the attorneys reported that a case was not ready for mediation or that the parties did not want to mediate, the Project Coordinator either tried to explore the issues more thoroughly or suggested that she could talk further with the parties to help them evaluate their interests in resolving the case. However, in most cases the attorneys did not see the need for direct discussions with the parties.

I. Selecting Mediators

Sponsors defined criteria for pilot mediators by relying on SPIDR, ABA, AAA, and U.S. district court standards.²⁴ The mediators had to be experienced in environmental conflicts and credible to the parties, the court, and the USIECR. The Project Coordinator (who agreed not to serve as a mediator in pilot cases) worked with USIECR and the court to develop a panel of neutrals committed to working with the project. She used the mediators already on USIECR's national roster and added others suggested by the court as well as other environmental mediators well known in Oregon. The panel of about fifteen mediators included lawyers and non-lawyers, men and women, and people with expertise in many different subject matter areas within environmental law. A preference was given for Oregonians to enhance relationships among the court, attorneys, parties, and local environmental mediators and to strengthen capacity in Oregon for environmental mediation. About half the mediators were experienced only in the more distributive type of cases, while the other half had experience with integrative approaches. Most of that experience, however, was not in disputes that had been filed in a court. This underscores the fact that litigating attorneys have not been using mediation in some cases that would likely benefit from an integrative approach, perhaps because they are most familiar with the mediation process used in distributive cases.

For certain highly technical cases, sponsors hoped to encourage mediation teams using a mediator and scientist. No such mediation team, however, was used in the pilot. Although several judges were interested in serving as mediators through the pilot, sponsors decided to focus the pilot on court-annexed mediation by external mediators. Therefore, cases that were reviewed by the Project Coordinator, but elected to use a settlement judge, were not considered to be cases mediated through the pilot. In part, some sponsors sought to complement the settlement expertise already offered in the District by judges. They also wanted to concentrate on voluntary

²⁴ See *infra* pp. 595–96 app. D.

mediation rather than settlement conferences in a District where some attorneys complained that some judges pushed settlements too aggressively.

In June 2000, the sponsors conducted a workshop for the pilot's mediators. In the one-day session, sponsors prepared mediators generally for the environmental cases that might be assigned during the pilot and facilitated an exchange of ideas and experience to hone the skills of the panelists. Panelists learned about environmental mediation in the Ninth Circuit, the pilot, and the evaluation components and were introduced to judges and court administrators active in ADR. During several portions of the workshop led by Dr. Adler, the mediators worked with a hypothetical dispute between a cement company and a neighborhood association. The panelists shared their views and experience on issues such as process design, raw emotions, joint versus separate sessions, and judicial involvement. Mediators brought differing opinions and approaches to many topics and the hypothetical generated useful discussion. Dr. Adler also drew on a variety of environmental cases to offer ideas for managing scientific and technical information. Mediators' evaluation of this workshop was positive, and several expressed an interest in continuing such discussions in other workshops or lunch meetings as a form of advanced training.

The Project Coordinator worked with lawyers to select mediators for particular cases. She asked them what qualities or expertise they wanted in a mediator. She chose three to five mediators from the panel who appeared to have the desired expertise and qualities and who were available and interested during the time needed. She sent the resumes of these mediators to the lawyers and encouraged them to interview the mediators whom they deemed best suited to the task. Within the small group of cases that went to mediation, lawyers usually sought a mediator for distributive cases based on their reputation and legal expertise rather than process skills. For the integrative cases, lawyers and parties seemed to focus on both process abilities and subject matter expertise, and were far more interested in learning more about the approach of the mediator. In at least four of the integrative cases, lawyers and one or more of the parties interviewed potential mediators by phone. No preliminary interviews took place in the distributive cases.

J. Work with Other Constituencies

As the pilot progressed, the Project Coordinator found a need to share information about the pilot and environmental conflict resolution with repeat players in the environmental cases filed before the court. For example, the U.S. Attorney's Office is involved in many pending cases, and the Project Coordinator also repeatedly dealt with several attorneys regularly

representing public interest groups and private litigants. She met with the U.S. Attorney for Oregon and subsequently conducted a pilot orientation session for a group of assistant U.S. attorneys who expressed interest in learning more about the pilot and the potential gains of mediation for environmental cases. Dealing with these types of barriers and developing such relationships appears to be important for serious exploration of mediation in environmental cases.

*K. Project Evaluation*²⁵

The pilot involved a small number of cases so it will have limited utility in terms of patterns and comparisons among environmental mediations. These are unique cases—standardized measurements and random assignments are not possible.²⁶ The evaluation is gathering the subjective views of participants and their projections of the cost, time, and utility of alternative methods of resolving a particular dispute. It must be recognized that the lawyers and parties will often want to justify the alternative they chose, and their ability to predict the outcome and satisfaction with another alternative will be somewhat suspect. Moreover, better data is needed to draw comparisons between litigated and mediated cases, and between ADR options like judicial settlement conferences and external mediation.²⁷ Potential differences in perceptions among participants may yet prove interesting, and the narratives of how cases were disposed of may prove useful for courts, litigants, attorneys, and mediators interested in environmental mediation.

The evaluation includes questionnaires sent to parties, attorneys, and mediators who participated in mediation of pilot cases. Follow-up interviews could develop this information further. The questionnaires and interviews cover both process and outcome evaluation. Participants are asked, for example, about their satisfaction with mediation sessions, the mediator's approach, and their own conduct during mediation. They are surveyed on outcomes such as settlements or partial settlements, time to settlement, streamlining of factual or legal issues, the perceived effect of mediation on

²⁵ District of Oregon Environmental Mediation Demonstration Project Attorney Questionnaire (on file with the Ohio State Journal on Dispute Resolution); District of Oregon Environmental Mediation Demonstration Project Mediator Questionnaire (on file with the Ohio State Journal on Dispute Resolution); District of Oregon Environmental Mediation Demonstration Project Questionnaire for Non-Participating Attorneys (on file with the Ohio State Journal on Dispute Resolution).

²⁶ See Deborah Hensler, *A Research Agenda: What We Need To Know About Court-Connected ADR*, DISP. RESOL. MAG., Fall 1999, at 16.

²⁷ See *id.*

long-term relationships of parties, and the cost-effectiveness of mediation. Further evaluation could include longitudinal work on participants' satisfaction with process and outcome over time, changing perceptions or conditions, and the durability of agreements reached. Eventually, the assessments may provide diagnostic tools for parties, lawyers, and courts seeking to implement environmental ADR programs.

IV. SOME THOUGHTS ON LESSONS LEARNED DURING THIS PILOT

Not all the parties, lawyers, and mediators in mediated cases have been surveyed or have responded to their questionnaires. The sponsors plan to follow up in these cases, and surveys may be sent in cases that did not proceed to mediation through the pilot.

At this juncture, only tentative lessons can be drawn, but several themes are worth noting. First, significant effort is required to design and implement such a pilot, even in a supportive court. Docket assessments and administrative help are critical to focus judges and lawyers on early resolution. Second, the work during the initial phase of the pilot offers a catalogue of potential challenges to implementing ADR programs for court-annexed environmental cases. As more information is gleaned from the attorneys, mediators, and Project Coordinator, we may learn a good deal more. For example, surveying attorneys who did not counsel their clients to use the pilot mediation option may provide useful insights.

A. Resource-Intensive Work Is Required

Establishing this pilot mediation program for environmental cases required significant investments of time, effort, and resources. The District of Oregon, like most courts, did not have the resources, complete data on environmental cases, or sufficient personnel to initiate the pilot and conduct the case development portion. The funding of a part-time Project Coordinator was essential to get the pilot underway and sustain it. In light of the Congressional mandate to promote ADR when it saves time and cost, federal courts face difficult choices about how to implement ADR. Should courts invest in the infrastructure to support ADR programs because of their potential to reduce time and cost for particular cases in the future? Evaluating costs to the court is complicated, because while the court will devote significant resources to establishing an ADR infrastructure, such support may result in benefits difficult to measure. For example, would mediation result in more durable agreements so that parties did not bring their conflicts back to court in several years? Would future conflicts never be filed in court because the parties improved their working relationships? The pilot may support the

conclusion that, left alone, a large percentage of environmental cases, like other cases, appear to settle without additional promotion of ADR. Alternatively, it may support a finding that judicial or Project Coordinator queries about mediation encourage earlier settlements, whether through the pilot's options or outside the pilot.

The pilot's administrative costs may be high because this is a unique project, one of the first focusing on federal environmental cases. The costs may be elevated due to the pilot's up-front efforts and its particular goals. For example, work was invested to foster the relationship among the project sponsors, develop or refine protocols, establish a panel of experienced environmental mediators, and initiate some "mini" case assessments, with a priority given to integrative rather than distributive cases. The costs may be attributable in part to how the particular Coordinator performed tasks. For example, helping the parties to negotiate the pre-agreement required some expense, but may have proved worthwhile in that it allowed the parties to enter mediation comfortably and may have increased the likelihood that they would reach agreement ultimately.

B. Early Docket Assessment Is Important²⁸

As noted earlier, environmental cases are a small portion of the Oregon docket. The goal of including fewer cases that were primarily distributive and more that contained integrative possibilities emerged as the pilot proceeded. Yet the Coordinator learned that the cases filed in Oregon were mostly distributive. Of the first ten she examined, seventy percent were distributive. By the time the Coordinator learned about those cases and checked with the attorneys, almost all had settled.

The Clerk of the Court expressed an interest in a screening process that assesses environmental cases sooner, because the filings entail court costs beyond the time invested by judicial personnel.²⁹ The developing field of environmental mediation practice reveals that an assessment of the conflict situation is typically needed in order to determine whether the conflict is likely to be amenable to mediation, to "get the parties to the table," to identify interests underlying legal positions, and to get an initial start on the commitments that would structure the process for success. Another court-annexed pilot might consider whether this type of early assessment is needed in pending environmental litigation or whether, once a lawsuit is filed, the parties are already at the table with the structure and issues defined or hardened by the litigation itself.

²⁸ This Section comes from the personal knowledge and involvement by Dean Kloppenberg with the project.

²⁹ See *supra* note 6.

COURT-ANNEXED ENVIRONMENTAL MEDIATION

Future projects might use more flexible case criteria or more intensive assessment work for a broad range of cases. Alternatively, a court might *require* case assessments in some complex environmental cases. To preserve the goal of offering opportunities for mediation which complements (rather than duplicates) judicial settlement conferences, future projects could involve more than one district to yield a much wider pool of integrative environmental cases. Additionally, some of the initial characterizations of cases by lawyers involved may be too narrow. Perhaps some cases, which appear to be primarily distributive, involve parties who will deal with each other in the future and mediation could improve working relationships.

Comparisons can be attempted between the approaches of Oregon settlement judges and the panel mediators. Are some cases best handled by judges? When are external mediators valuable? Which types of environmental cases should be subject to a full case assessment? Who should perform assessments? Could some cases be best served by a combination of a settlement judge and an external mediator who can manage the ongoing issues in a multi-session mediation that may take months or even years to complete?

Judges can play an important convening role in environmental mediation. One of the attorneys who found the pilot mediation process and outcome quite favorable noted that the parties participated in mediation through the pilot because the judge "ordered" them to do so through a letter suggesting the option. Another attorney used the pilot's mediation option, in part, because he or she did not want to appear to be reluctant to cooperate in ADR efforts generally, which many judges in Oregon value.

Rather than investing personnel time (from an external coordinator or a court administrator) in searching dockets, judges could create incentives for parties to move to mediation or at least go through a case assessment soon after a lawsuit is filed. At the Department of the Interior, for example, administrative law judges have ordered parties to an assessment. A report about the appropriate dispute resolution method is then provided to the judge and/or the parties. The reports do not reveal confidential facts, underlying interests, or which party/parties declined to use ADR. Such mandated assessment might be necessary to trigger fuller case assessments by a neutral, which include both parties and attorneys early in litigation. In this pilot, the Project Coordinator dealt primarily with the attorneys and did not aggressively push to speak with the parties themselves, because the project was not intended to do full assessments of each case. Although she tried to educate the attorneys about the advantages of mediation and about the possibility of different models that might fit their case, she did not try to coerce reluctant parties to participate in mediation because of the emphasis

on voluntary external mediation, because the parties had to pay for the mediation, and because the mediation was court-annexed.

*C. The Value of an ADR Administrator*³⁰

Courts are likely to need at least a part-time administrator for such projects. As of early 2001, the Coordinator had devoted more than 350 hours to pilot start-up operations, case assessment, formation of the mediator panel, and fostering discussion of dispute resolution options among judges, attorneys, parties, and mediators. As described above, the Coordinator devoted extensive time to digging out information about particular cases and keeping conversations going about appropriate resolution processes. In one case, she helped the parties negotiate a pre-agreement before they were ready to proceed with mediation. An administrator, who understands litigation, can work well with judges (e.g., inquiring about particular cases on their calendars), and who is knowledgeable about various dispute resolution options is important. Ms. Hallmark's background in environmental cases was useful in dealing with the attorneys during this pilot.

Additionally, there is some value in using a person with sufficient autonomy from the judge adjudicating a case. Because the sponsors placed a high value on obtaining truly voluntary consent before cases entered mediation, the Coordinator was not forceful about pushing mediation in the face of resistance. One party wanted a judge to tell the opposing party to go to mediation, in part because the judge had suggested mediation in a separate case involving the first party. In a third case, one party felt obligated to explore mediation due to a judicial suggestion, but the Project Coordinator made clear that mediation was voluntary and the party did not choose mediation. The Coordinator thus served as a buffer when parties or their counsel felt pressure from judges. A court employee can serve the same function, but if the court places a high value on the voluntariness of the ADR option, that should be made clear to all involved and the standard for reviewing the employee should reflect that priority (i.e., valuing voluntariness more than disposition figures).

An ADR administrator can be placed in a difficult position, because she may hear things which judges do not say directly to litigants and lawyers. For example, during one case, a judge gave the Coordinator permission to tell a recalcitrant party that the judge was ready to rule against the party. The ruling would not have completely resolved the dispute, but would only instigate another round of appeals or further administrative activity. The Coordinator chose not to reveal what the judge conveyed to either party.

³⁰ This Section comes from the personal knowledge and involvement by Dean Kloppenberg with the project.

The Coordinator also created a link between the court and conflict resolution practitioners, which helped to expand options for courts in the private ADR sector. State, local, and court rules about confidentiality and mediator immunity should be canvassed as any new ADR program is implemented.

D. Challenges to Using Mediation in Environmental Cases

Although this pilot was limited in scope, time, and resources, it is a useful vehicle for reflecting on the challenges courts face in trying to promote ADR options for environmental and some other complex public policy cases.

1. Perceptions of ADR as Evaluative Settlement Conferences³¹

The Project Coordinator reported some resistance to mediation in the pilot because of some judges' and lawyers' (and perhaps their clients') perception of court-connected ADR. Although the pilot sought to offer opportunities for mutual gains bargaining and facilitative processes, some lawyers assumed the pilot involved traditional settlement conferences, distributive bargaining, or primarily evaluative mediation. This is understandable because many lawyers are not well educated about the range of process options within mediation. Additionally, the differences between judicial settlement conferences and external mediation are not well-defined or agreed upon. Indeed, some courts call settlement conferences mediation and some mediators engage in evaluative processes similar to settlement conferences.³² This perception is particularly understandable in a court where some judges promote settlement in an aggressive manner. Past exposure to mediators and settlement judges, combined with the lack of lawyer and client education about the diversity of mediation approaches, compound this perception.

During the evaluation, lawyers and clients who did not enter the pilot could be queried about their perceptions and their ADR preferences. The data may reveal little demand for court-annexed mediation programs, since settlement judges are available at no cost and can handle distributive cases competently. Alternatively, the data may support the need for education

³¹ This Section comes from the personal knowledge and involvement by Dean Kloppenberg with the project.

³² See Dorothy Wright Nelson, *ADR in the Federal Courts—One Judge's Perspective: Issues & Challenges Facing Judges, Lawyers, Court Administrators & the Public*, 17 OHIO ST. J. ON DISP. RESOL. 1, 13 (2001).

about environmental conflict resolution and possibilities beyond settlement conferences.

*2. The Cost of External Mediation*³³

For some parties, the cost of external mediation was cited as an impediment to attempting it. As noted, judicial settlement conferences are readily available in the District of Oregon at no extra fee. While panel mediators were willing to reduce their standard fees, at least for an initial period, the cost barrier appeared significant in a few cases. In another pilot mediation, lawyers for both parties reported substantial cost savings because the case did not proceed to a complex trial necessitating expert witnesses. One attorney estimated that a client saved \$200,000–\$400,000 due to mediation. In another pilot case, attorneys for both parties estimated that the mediation was more expensive than litigation would have been. Nevertheless, the result achieved through mediation was more satisfactory to both. They reported that litigation would have produced a “bizarre” and “completely impracticable” procedural solution for this NEPA case, but through mediation the parties designed substantive relief.

Attorney fees were raised as an issue in several questionnaires. Fees were an issue in reaching settlement at times. Judges and attorneys expressed concerns about how lawyers will get paid with mediation of environmental conflicts. On the plaintiff’s side, statutory attorney fees claims need to be resolved as part of a settlement, and on the defense side, concerns about billable hours are frequently important. One judge reported that judges need to know when a case is ripe for mediation or settlement talks, cognizant of such practical issues as whether the lawyers have been able to generate enough fees from a given case before proceeding to serious settlement discussions. The Project Coordinator suspected that some lawyers were “hiding” behind cost justifications as a reason to decline the mediation option. Cost as a barrier could be examined for cases not entering mediation.

3. Lawyer Control of Communications with Parties/Need for Case Assessment

The Project Coordinator offered to speak with parties about the possibilities offered by mediation in some pilot cases; however, lawyers refused, desiring instead to control the flow of information to their clients about dispute resolution options. If the attorneys said the case was not ready

³³ This information comes from the results of surveys that cannot be released, because confidentiality was promised.

for mediation, or said their clients did not want to mediate, the Project Coordinator did not push mediation aggressively and did not insist on speaking with the clients directly. The Project Coordinator suspects that full case assessments might have produced more cases amenable to mediation, but such assessments are not possible without interviewing parties. Other pilots might consider a judicial order to assessment, with parties included.

The Coordinator noted that some parties tried to negotiate on their own without setting the groundwork for mutual gains. Moreover, because many of the lawyers and parties were most familiar with the model of mediation in which offers are exchanged, they were trying to guess at underlying interests or making assumptions based on inadequate knowledge.

4. Lawyer Perceptions of Cases as Inappropriate for Mediation

In some cases, lawyers concluded that matters should not be resolved by mediation. Sometimes this was simply because they were already involved in negotiations or negotiations ensued after an inquiry from a judge or the Coordinator. In other instances, the lawyers reported that the parties sought adjudication to establish a legal precedent. Sponsors agreed that such cases were not appropriate for the pilot.

At other times, lawyers reported that their convictions were firm, their client was right, and a case contained no issue on which potential for compromise existed. Some wanted to wait for a judge to tell them there was a reason to consider settlement. The Project Coordinator surmised that some of these attorneys were focused on legal issues to the exclusion of other interests their clients might have. For example, lawyers sometimes focused on narrow legal issues before the court, such as, Is there a duty for the agency to consult on an endangered species matter? Lawyers did not seem willing to explore other interests: What would your client really want to see happen in terms of species management? Judges told of environmental cases in which a party was upset that an agency did not take their views into account. Mediation might afford an airing of their views as well as decisions about future communication processes. Lawyers often failed to see the role mediation could play in advancing such interests.

5. Distrust Among Parties

Several Oregon judges noted that environmental disputes are sometimes spurred by communication problems and distrust between governmental organizations and other interests.³⁴ This observation was confirmed by the

³⁴ See *supra* note 6.

Project Coordinator, who perceived that serious distrust among some parties prevented them from exploring mediation in a few cases. The parties did not believe the relationship could improve. Because these cases involved long-term relationships and repeated contact between parties, they might be ideal for mediation; but past experience among the parties made them hesitant even to enter a dialogue with a mediator or judge about a less adversarial process than litigation. One case in which attorneys exhibited significant distrust did proceed to mediation, but no agreement was reached. The mediator characterized both parties as "enamored of their respective positions" and found at least one party unwilling to put sufficient time into the conflict resolution process.

6. Delay Is Sometimes a Gain

In environmental cases, delay is helpful to some parties. For example, litigation may be filed with the goal of stalling a development project or government action. If so, parties are reluctant to enter a more expedited process like mediation. The slower pace of litigation and the fact that the parties have less control over that process can be beneficial. The Project Coordinator concluded that appreciation for delay was one factor in several decisions not to enter mediation during the pilot.

Sometimes, a party or lawyer wants to wait for discovery or the judge's ruling on a dispositive motion or an agency decision like an ESA listing determination. When no firm deadline or imminent decision or forcing mechanism is present, reluctant parties may simply await more pressure before exploring settlement options. In one potential pilot case, the parties chose to await a summary judgment ruling, but that ruling did not offer complete victory to either side. In another potential pilot case, some parties thought that the national elections could impact the lawsuit. Nevertheless, prodded by earlier judicial settlement conferences, the parties reached a tentative agreement conditioned on congressional funding. In another potential pilot case, parties decided to await a judicial determination of whether an environmental impact statement (EIS) was needed. Although issues for negotiation often remain when an EIS is ordered, in this case it was thought that ordering an EIS would be so cost-prohibitive that the project would be stopped, satisfying one party's goal.

V. FUTURE DEVELOPMENT OF PILOTS AND SPIN-OFFS

In addition to the avenues for exploration noted above, other possible directions for court-related environmental conflict resolution projects could include the following:

COURT-ANNEXED ENVIRONMENTAL MEDIATION

1. Offer training or education about ADR options for judges, mediators, lawyers, and repeat players in environmental litigation.

2. Provide fuller docket assessment, including an evaluation of emerging patterns of environmental disputes; in Oregon, for example, assessment of one potential pilot case led to interest in exploring a process for resolution of a group of related, future filings.

3. Study why cases did not choose to pursue mediation through the pilot. Gather more perceptions on which types of environmental cases are well suited to mediation and what barriers to mediation exist.

4. Study whether court-related inquiry (from the judges or the Coordinator) spurred private settlement efforts.

5. Explore the differences between ADR offered by judges and external mediators on grounds of persona (including voluntariness issue), approach, and cost. Can judges not devote as much time or would judicial encouragement not prompt the same outcome?

6. Study how court and external mediation processes could be combined effectively in environmental cases. Oregon judges expressed a willingness to "back up" external mediations by coming in to "close the deal" if needed. They offered to be available to get persons with settlement authority to the table; they offered to hold mock trials if helpful, hold a settlement conference on a narrow legal issue as a supplement to mediation, or explore appointing a neutral scientific expert. Such teamwork may offer wonderful means for individual tailoring of dispute resolution options.

7. Compile some suggested settlement tools and strategies from particular case studies after further evaluation of external mediations under the pilot and judicial settlements of environmental cases in the Oregon federal court. Thus far, judges and mediators have provided information on using neutral scientists agreed upon by the parties, purchasing an insurance policy to cover future contingencies, and setting up a trust for plaintiffs to cover potential long-term damages or contingencies.

8. Explore the value of partial settlements of complex cases.

9. Provide training on environmental conflict resolution options to court personnel (including judges, administrators, and law clerks); to industry groups, public interest groups, and other repeat players; and to lawyers in U.S. Attorney's Offices and the U.S. Department of Justice.

VI. SUMMARY

In returning to the questions posed at the outset of this Article, the Oregon pilot gives us a glimpse of how challenging it is, even for a receptive court system, to provide public policy mediation for environmental cases. This type of mediation is not amenable to one-day settlement conferences or

a limited amount of mediator time at a free or discounted rate such as the common, four-hour pro bono panels used by many courts. To provide an option for public policy mediation within courts is expensive—as it requires administrative oversight as well as education and training of court personnel and mediators. It may be worthwhile doing within a large court system (*e.g.*, the federal courts as a whole or within a large circuit) or agency because of the important public issues raised by environmental disputes and the potential of mediation to resolve those disputes with creative, durable solutions. It appears difficult, however, for a smaller court system to create and sustain such a program on its own.

Because many of the filed litigation disputes centered on allocation of costs for pollution cleanup (*i.e.*, primarily distributive issues), the litigation queue might be less costly and more efficient than an early mediation program for promoting settlement without trial. These distributive cases are much more likely to move into settlement or mediation on their own, and do not usually require extensive case assessment, convening, and process design, as do many multi-party public policy cases with integrative issues. The Oregon pilot may reduce some of the start-up costs for other courts and agencies wishing to experiment with public policy mediation programs by reviewing some of the issues that need to be considered, educating decision makers about the resources required, or simply by providing a sample format and documents to get another project underway.

Perhaps the market for public policy mediation services will grow, lessening the need for court-annexed programs in environmental and other public policy cases. Presently, however, many barriers seem to make the market imperfect. One of the most glaring barriers is the significant gulf remaining between the knowledge of judges and lawyers about the type of mediation available in these kinds of conflicts and the work of environmental conflict resolution experts. One solution is to provide more education and training for law students, lawyers, repeat parties, and court personnel about the growing field of public policy mediation. Professor Sander's multifaceted dispute resolution center has grown in the last twenty-five years from an idea into reality for many courts. In another twenty-five years, perhaps a number of courts will supplement the current ADR options with an option of early conflict assessment in public policy disputes so that parties can determine, with their lawyers, whether it is worthwhile exploring a mediated solution.

COURT-ANNEXED ENVIRONMENTAL MEDIATION

APPENDIX A

U.S. DISTRICT COURT FOR THE DISTRICT OF OREGON ENVIRONMENTAL MEDIATION PILOT PROJECT GOALS AND OBJECTIVES

1. Mediate 5 to 10 environmental litigation cases in their entirety, or mediate portions thereof (for example, reducing the number of contested technical and scientific facts).
2. Utilize highly experienced and well-assigned mediators as judicial adjuncts.
3. Create additional opportunities for integrative and mutual gains in negotiations in U.S. District Court environmental cases.
4. Increase the pace of issue resolution by settling whole cases or major portions of cases (streamlining) faster than would happen otherwise.
5. Beat the average time to disposition for "893" environmental cases.
6. Produce settlement discussions that are perceived to be at least as fair and satisfying as would happen otherwise on the normal trial track.
7. Reduce the emotional friction involved in resolving court cases.
8. Improve the quality of communication and information exchange in fact-intensive cases, particularly those that involve contested technical and scientific issues.
9. Discover better ways to match the skills and experience of prospective mediators with the needs of litigants and lawyers.
10. Produce more stable, enduring, and implementable outcomes so that parties do not have to return to litigation.
11. Save time and money for the court and the parties.
12. Evaluate the outcomes of the pilot project and publish the results.
13. Develop a compendium of settlement tips, tools, and techniques.
14. Develop the further use of environmental mediation in the District of Oregon, with potential applications to other Districts.

APPENDIX B

U.S. INSTITUTE FOR ENVIRONMENTAL CONFLICT RESOLUTION
OREGON FEDERAL DISTRICT COURT
DEMONSTRATION MEDIATION PROJECT
CASE SELECTION CRITERIA

Cases meeting some or all of the following criteria will be given priority for inclusion in the Demonstration Mediation Project.

1. Parties who will continue to have a relationship in the future, after this case is resolved.
2. Parties include a Federal Agency, or involve a federal statute, rule or policy dealing with the environment.
3. Issues that are not easily resolved by a judicial decision or by a traditional evaluative settlement conference.
4. Cases that do not require establishment of a new legal precedent for resolution.
5. Cases in which the parties have some overlapping interests and a possibility for mutual gain through mediation.
6. Complexity of issues and/or relationships. The Project would like to have some cases involving issues of scientific or technical complexity.
7. Parties must be willing to mediate in good faith, and bring the right people to the table.
8. Parties must be willing to pay the mediator fees.
9. Parties must be willing to cooperate with the Demonstration Project, allow the Institute for Environmental Conflict Resolution to observe and to collect data while protecting all confidential information.

Revised June 12, 2000
R. Elaine Hallmark, Esq.

COURT-ANNEXED ENVIRONMENTAL MEDIATION

APPENDIX C

DRAFT

AGREEMENT FOR MEDIATION SERVICES AND CONFIDENTIALITY AGREEMENT

THIS AGREEMENT FOR MEDIATION SERVICES and CONFIDENTIALITY AGREEMENT is entered into this ____ day of _____ 2000, by and among the U.S. Institute for Environmental Conflict Resolution (the "Institute"); _____ ("Mediator"); and the following litigation parties:

_____ (the "Parties").

BACKGROUND

A. The Parties are litigants in _____, Case No. 00-____ pending in the U.S. District Court for the District of Oregon before Judge _____ (the "Litigation").

B. The Parties have agreed to participate in mediation of issues related to the Litigation and to participate in a demonstration project on environmental mediation sponsored by the Institute in cooperation with the Federal District Court of Oregon (the "Oregon Demonstration Project").

C. The Institute is authorized by the Environmental Policy and Conflict Resolution Act of 1998, (Public Law 105-156, 20 U.S.C. § 5601 et seq.) to provide a variety of conflict resolution services in connection with disputes related to the environment, public lands, or natural resources.

D. The Parties, the Mediator and the Institute desire to enter into this Agreement to provide for mediation of the issues involved in the Litigation, on the terms and conditions set forth.

NOW, THEREFORE, the parties agree:

1. Scope of Services

The Mediator shall provide mediation services pursuant to the terms set forth below and any ground rules or other working agreements adopted by the Parties. The Mediator shall provide a status report no less than monthly to

Institute Senior Mediator David Keller, including any schedule of upcoming mediation sessions and proposed agreements.

2. Period for Performance

The Period for Performance for the Mediator shall begin on the date first set forth above and shall continue so long as the Parties agree to continue the mediation. The Mediator's services may be terminated upon the mutual written consent of the Mediator and all the Parties, or upon five (5) days written notice by either the Mediator or all the Parties.

If there are three or more Parties, one Party may elect unilaterally, upon five days written notice, to terminate its efforts to reach a negotiated agreement and resume litigation. In that event, the remaining Parties and the Mediator may agree to continue the mediation, provided that the terminating Party shall bear no further obligation to share in mediation costs incurred following the effective date of the notice of termination.

3. Fees; Payment

A. The Parties agree to pay the Mediator at the rate of \$_____ per hour for professional services [plus \$_____ per hour for reasonable and necessary travel time]. The Parties shall pay the costs of any meeting rooms, expert services or other costs connected with the mediation and travel and other reasonable expenses incurred by the Mediator.

B. The Parties will be provided a monthly statement of time and professional fees. Payment will be due upon receipt of the statement.

C. Each Party agrees to pay the following share of the Mediator's fees and shall be liable to the Mediator for its share: _____ . Each Party represents and warrants that the individual signing on its behalf is fully authorized to enter into this Agreement on its behalf.

4. Confidentiality

A. This Agreement and the mediation process (including any convening and assessment activities) held hereunder are confidential. The Parties, the Mediator and the Institute shall not disclose to third parties confidential information regarding the mediation unless compelled to do so by court order. The information that is confidential and privileged as settlement communications includes, but is not limited to, all statements,

COURT-ANNEXED ENVIRONMENTAL MEDIATION

communications, offers, conduct, findings or conclusions, written submittals, exhibits, demonstrative aids, documents, notes or papers made in preparation for or in the course of and relating to the subject matter of the mediation, whether made by the Mediator, the Parties, their agents, employees, experts, consultants or attorneys (all of the foregoing referred to as "Confidential Information"). All Confidential Information shall be treated as compromise and settlement negotiations for the purposes of application of the Federal Rules of Evidence and Oregon or other state rules of evidence regarding settlement, compromise and mediation confidentiality, and shall not be admissible in any arbitration, litigation or other proceeding for any purpose, including impeachment.

B. The parties agree that no actions taken or statements made pursuant to this Agreement or in the mediation sessions will be asserted to be the basis for any claim of waiver of attorney-client or work product privilege, or the waiver of confidentiality of business information.

C. At the conclusion of the mediation process and upon the written request of a Party that provided documents or other material to the other Party(ies), the Party recipient and Mediator will return the documents or materials to the originating Party without retaining copies thereof.

D. The Mediator shall be disqualified as an attorney, witness, consultant or expert in any pending or future investigation, action or proceeding relating to the litigation that is the subject matter of the mediation, including any investigation, action or proceeding that involves persons or entities that are not a Party to this mediation (collectively "Subsequent Proceeding").

E. The Mediator and any Confidential Information in the Mediator's possession shall not be sought in discovery or subpoenaed from the Mediator by any Party. All Parties shall oppose any effort to have the Mediator and documents in the Mediator's possession subpoenaed or produced in a Subsequent Proceeding. A Party who receives any such subpoena or document request shall promptly notify the other Party.

F. A Party shall not seek to discover or obtain Confidential Information from another Party in any legal proceeding. All parties shall oppose any effort to have Confidential Information disclosed in any Subsequent Proceeding. A Party who receives any such subpoena or document request shall promptly notify the other Party(ies).

G. Unless otherwise agreed by the Parties in any written settlement agreement resulting from the mediation, a Party may disclose Confidential Information in court pleadings insofar as necessary to enforce the terms of such settlement agreement, but such disclosure of Confidential Information shall be in the most limited degree necessary to enforce the settlement agreement.

H. No Confidential Information will be communicated to the Court. The Mediator may coordinate with the Court regarding time schedules and other needs of the mediation process with the consent of the Parties.

I. Notwithstanding any of the foregoing provisions of this Section 4, any information that is otherwise discoverable or admissible shall not be rendered immune from discovery or inadmissible as a result of its use in the mediation. This Section 4 does not bar the disclosure of any communication that reveals the intent to commit a felony or inflict bodily harm, or any communication which is required to be made public by statute. Nor does this Section 4 prevent the Mediator from disclosing the fact that he/she is or has served as a mediator in this matter.

J. As provided in Paragraph 5 below, information from the Parties regarding the mediation will be used in connection with evaluation, including possible reports or articles regarding evaluation results, but neither the names of the Parties nor any facts that would identify the Parties shall be disclosed.

5. Program Evaluation

A. The Institute, in cooperation with the University of Oregon School of Law ("Law School") and the District of Oregon ("District"), will undertake an evaluation of the mediations conducted in the Oregon Pilot Project. The evaluation will permit the Institute, Law School and District to evaluate mediation process effectiveness, and make changes and improvements to the Project ("Program Evaluation"). Part of the Program Evaluation will include the collection of information, including questionnaires and interviews, concerning the mediation and mediation process by the Institute and the Law School ("Evaluation Information"). The Evaluation Information will be used in preparation of evaluation reports and/or publications, provided that confidentiality as to the identities of the Parties shall be preserved, as set forth in Paragraph 4(J) above.

B. The Parties, their attorneys and the Mediator agree to participate in the Program Evaluation. The Parties, their attorneys and the Mediator agree that

COURT-ANNEXED ENVIRONMENTAL MEDIATION

they will respond to reasonable requests for Evaluation Information; provided, however, that no Party, attorney or Mediator needs to disclose Confidential Information in the Program Evaluation.

C. The forms, materials, interviews and other components in the collection of Evaluation Information will not normally include the collection of Confidential Information. If a mediation Party, attorney or mediator desires to include Confidential Information as part of the Program Evaluation, separate confidential forms will be provided and the forms will be submitted solely to the Institute.

6. Role of Institute

The Institute, its staff and contractors shall be deemed to be acting as neutrals with respect to this mediation, and they shall abide by and be protected by the Confidentiality provision of this Agreement. The Mediator may discuss issues related to mediation techniques or strategies with the Institute (particularly Elaine Hallmark, the Oregon Project Coordinator for the Institute, or the Institute's General Counsel Ellen Wheeler). The Parties and Mediator agree that Elaine Hallmark or Ellen Wheeler shall be informed of scheduled mediation sessions and may observe one or more mediation sessions.

7. Presence of Parties

Unless otherwise agreed, named Parties or representatives with authority to settle shall be present at all mediation sessions.

8. Entire Agreement: Amendments

This Agreement sets forth the entire agreement of Parties and the Institute. This Agreement may be modified only by a writing signed by authorized representatives of the Parties.

IN WITNESS WHEREOF, the Parties, Mediator and Institute have executed this Agreement as of the date set forth above.

Mediator:

Institute:

U.S. Institute for Environmental Conflict Resolution

By: _____
David Keller
Senior Program Manager

Parties:
[Name of entity]
By: _____
Its: _____

[Name of entity]
By: _____
Its: _____

COURT-ANNEXED ENVIRONMENTAL MEDIATION

APPENDIX D

DISTRICT OF OREGON ENVIRONMENTAL MEDIATION DEMONSTRATION PROJECT NEUTRALS

Mediators assisting with the demonstration project will have extensive experience in environmental mediation. For purposes of this project only, a list of qualified individuals is being put together by UIECR for approval by the Court.

1. All mediators used in this project will work under applicable Court rules and the “Standards for Mediators” promulgated by SPIDR, ABA, and AAA.

2. It is a preference in this demonstration project to use mediators who live and work in the District of Oregon. Where the specific mediation requirements of individual demonstration cases cannot be met from the mediation pool in Oregon, other mediators from the surrounding region may be used.

3. Nominations to the project panel will come from District of Oregon judges and administrators, and from the USIECR which has a national roster of qualified mediators. If appropriate, mediators may also be drawn from the roster maintained by the Oregon State Dispute Resolution Program.

4. Mediators may be lawyers or non-lawyers but must be “experienced” and “credible” to the parties, the Court, and the USIECR.

5. All demonstration project mediators are encouraged, but not required, to apply to the USIECR’s national roster. The roster is described and available electronically at <http://www.ecr.gov>. Generally, USIECR roster entry criteria include having served as the principal professional in two to ten environmental cases totaling 200 hours with each case involving at least 20 hours of work. Other related qualifying experience includes training, work, or substantive background in environment and public policy disputes involving pollution (prevention, cleanup, or consequences), land use, natural resource use or distribution, environmental permitting, facility or infrastructure siting disputes, environmental justice, and negotiated rulemaking, enforcement, or compliance relating to environmental cases is. Experience may be at the national, regional, state or local level.

6. Mediation teams made up of a mediator and a scientist may be used in certain highly technical cases. For the appropriate case, the Institute will locate scientific expertise that is impartial and acceptable to the parties. Relationships have been established by USIECR with two institutions that are building banks of experts: (a) Duke University Law School's Private Adjudication Center which maintains a list of outstanding scientific and medical experts as a resource for federal courts and (b) the American Association for the Advancement of Science, which is developing a demonstration project on court-appointed scientific experts. USIECR Senior Program Manager, Emily Rudin, previously with the National Science Foundation, will assist with this function.

7. The panel of mediators will be maintained by Elaine Hallmark, Esq. who is serving as USIECR's Project Coordinator for Oregon. Elaine will assist the court and the parties in reviewing the credentials of prospective mediators and help facilitate their selection. While Elaine is a highly accomplished environmental mediator, she will not serve as a mediator on any of the demonstration case.

Peter Adler
January 27, 2000